U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 March 2003

CASE NO.: 2002-STA-35

IN THE MATTER OF:

DAVID O. ROBERTS

Complainant

v.

MARSHALL DURBIN COMPANY

Respondent

APPEARANCES:

JOHN W. HALEY, ESQ.

For The Complainant

ELMER E. WHITE, III, ESQ.

For The Respondent

BEFORE: LEE J. ROMERO, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105 (herein the STAA or Act), and the regulations promulgated thereunder at 29 C.F.R. Part 1978. The STAA prohibits covered employers from discharging or otherwise discriminating against employees who have engaged in certain protected activities with regard to their terms and conditions of employment.

On or about September 26, 2001, David O. Roberts (herein Complainant or Roberts) filed a complaint against Marshall Durbin Company (herein Respondent) with the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor (DOL), complaining of various unsafe acts under the STAA, including his termination on

September 18, 2001. (ALJX-1). An investigation was conducted by OSHA and on May 13, 2001, the Regional Administrator for OSHA issued the Secretary of Labor's Findings concluding that Complainant's complaint lacked merit. (ALJX-1). Complainant subsequently filed a request for formal hearing with the Chief Administrative Law Judge, Office of the Administrative Law Judges.

This matter was referred to the Office of Administrative Law Judges for a formal hearing. Pursuant thereto, a Notice of Hearing and Pre-Hearing Order issued scheduling a hearing in Birmingham, Alabama on August 20, 2002. (ALJX-2). On June 27, 2002, in compliance with the Pre-Hearing Order, Complainant filed a formal complaint alleging the nature of each and every violation claimed as well as the relief sought in this proceeding. (ALJX-3). On July 5, 2002, Respondent duly filed its Answer to the Complaint. (ALJX-4). The parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs.[1]

Complainant and Respondent filed post-hearing briefs by the due date of November 8, 2002 and also filed timely reply briefs. Based upon the evidence introduced and having considered the arguments and positions presented, I make the following Findings of Fact, Conclusions of Law and Recommended Order.

I. ISSUES

The issues for resolution based upon the pleadings are:

1. Whether Roberts engaged in protected activity within the meaning of the STAA?

2. Whether Respondent terminated Complainant in retaliation for his protected activities in violation of the STAA?

II. CONTENTIONS OF THE PARTIES

Complainant asserts that on September 17, 2001, he refused to drive two trucks assigned to him by Respondent because both trucks were missing or had inaccurate post-trip inspection reports and were in unsafe working condition. The following day, September 18, 2001, Complainant contends he was wrongfully terminated by Respondent in violation of the STAA for refusing to operate the two

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[1] References to the record are as follows: Transcript: Tr.___; Complainant's Exhibits: CX-___; Respondent's Exhibits: RX-___; and Administrative Law Judge Exhibits: ALJX-___.

unsafe trucks. He further contends that his operation of the two trucks would have violated Federal Motor Carrier Safety Administration Regulations §§ 392.7, 396.11, 396.13 and 396.15. Complainant seeks remedies of reinstatement by Respondent, expungement of any negative information added to his file by Respondent, compensatory damages to include full back pay, safety bonuses and payments for vacations beginning from the date of his termination on September 18, 2001, attorney's fees, interest and damages resulting from "mental anguish of his not being able to find gainful employment to support both himself and his family."

Respondent concedes that this proceeding is brought pursuant to the STAA and is properly before the Office of Administrative Law Judges. Respondent admits that on September 17, 2001, Complainant refused to drive two trucks assigned to him. Respondent contends that its employment decision to discharge Complainant was made in good faith, for good cause and was based on reasonable, legitimate, non-discriminatory factors and not in violation of the STAA. Respondent further disputes the nature and extent of Complainant's injuries and damages and argues Complainant has failed or refused to mitigate such damages. Respondent also contends that Complainant did not have a reasonable apprehension of serious injury because of the alleged unsafe conditions and did not seek or failed to obtain a correction of the allegedly unsafe conditions. Respondent seeks dismissal of Complainant's claim with an assessment of all costs against Complainant and an award of Respondent's reasonable attorney's fees.

III. SUMMARY OF THE EVIDENCE

The Testimony

David O. Roberts

Roberts is currently 40 years of age and finished the tenth grade of formal education in 1978. He began in the trucking industry in 1978 after leaving school. (Tr. 21). He began as a class B service mechanic/trailer technician and also worked as a mechanic on commercial trucks. He also drove commercial trucks for 14 years with Super-Value Stores, Inc. He completed driver's training at Bevel State when re-certifying for his commercial drivers license (CDL). (Tr. 22-23).

Complainant began employment with Respondent in 1997. He was hired by Mr. Larry Stone. (Tr. 23). During the first 8½ months he worked in the warehouse and did no truck driving. Thereafter, he began driving as well as working as a driver-trainer. (Tr. 24). He performed these functions for three years under the supervision

of Larry Stone, Respondent's driver-manager. Part of his responsibility as a driver-trainer was to teach drivers the Federal Motor Carrier Safety Regulations (herein FMCSR). Complainant testified that Larry Stone was replaced by Mr. Jim Jamison (herein Jamison). (Tr. 26).

Complainant testified that during his last year of employment with Respondent, he took one particular route as a driver. (Tr. 25-26). On or about June 10, 2001, Larry Stone left the company. At that time, Complainant had no write-ups or discipline concerning failure or refusal to obey the rules or regulations of Respondent or the FMCSR. (Tr. 26). Jamison was hired in late May 2001 to replace Stone. Complainant testified that, as a driver, he had no chargeable accidents, motor moving violations or documentation of any unsafe operation of a vehicle. (Tr. 27).

On September 17, 2001, Complainant reported for work at about 4:00 a.m. (Tr. 27). He testified that he drove three days per week, Monday, Wednesday and Friday. (Tr. 27). The trucks used by Respondent were driven by multiple drivers. Complainant testified the first thing he always does is check the truck documents before initiating his assignment. He checked for the lessee agreement, proof of insurance and the post-trip inspection report completed by the previous driver of the truck. (Tr. 28). Complainant testified the required documents to be inspected under the FMCSR are set forth in Regulations 396.11 and 396.13. (Tr. 29).

Complainant testified the post-trip inspection report for the first truck assigned (Truck No. 1) contained inaccuracies which led him to believe that the previous driver had not done a physical inspection of the truck. (Tr. 28). He claimed there was a 380-mile difference in the post-trip report and the odometer reading. Complainant reported the inaccuracy to Ms. Lily Jeffcoat, the designated person to receive such a report. (Tr. 29). Ms. Jeffcoat informed Complainant she would contact Jamison and then made a phone call to Jamison. Ms. Jeffcoat thereafter also inspected Truck No. 1 and found it to be in non-compliance. (Tr. 30).

Ms. Jeffcoat's inspection of the vehicle is contained in Complainant's Exhibit No. 1. (CX-1). The inspection report reveals there was "air leaking" of more than four pounds per square inch in one minute, which forbade operation of the truck. Because of the bad brakes, Ms. Jeffcoat placed the truck "out-of-service." (CX-2). Complainant also noted in his pre-trip inspection report of Truck No. 1 that the brakes were bad and marked the truck "out-of -service." (Tr. 32; CX-3).

Complainant telephoned Penske, which has a service agreement with Respondent, to implement repairs of the defective brakes on Truck No. 1. (Tr. 32-33). A Penske representative, Mr. Morrison, arrived at the facility, however, he could not, or would not, fix the defective brakes on the truck according to Complainant. Complainant made two more checks of the leaking brake system and there had been no improvement of the air leak. Truck No. 1 did not pass the brake test. (Tr. 33). Complainant testified he could not drive Truck No. 1 until the brakes were fixed. (Tr. 33-34). He waited for Jamison to arrive and assign another truck to drive. (Tr. 34-35).

Jamison assigned Truck No. 844387 (Truck No. 2) to Complainant to drive. Complainant testified Truck No. 2 was used mostly for local routes and was an older vehicle. Complainant expressed concerns to Jamison about Mr. Morrison's actions and the lack of an adequate post-trip inspection report on Truck No. 1. (Tr. 36). Complainant made copies of FMCSRs 396.11 and 396.13, which required post-trip inspection reports, and gave them to Jamison. (Tr. 36; CX-4). Complainant testified Jamison "got real aggressive" and remarked the regulations were "all just a bunch of bullshit." (Tr. 37).

Complainant then proceeded to Truck No. 2 and looked for a post-trip inspection report with the assistance of Ms. Jeffcoat. He testified there was a nine-mile discrepancy reflected in the post-trip inspection report and the odometer reading. (Tr. 38). He reported to Jamison the post-trip inspection report contained a nine-mile discrepancy and Truck No. 2 had defective windshield wipers. (Tr. 38).

Complainant testified Jamison then prepared a post-trip inspection report which he alleges to be "falsified." The report is dated September 10, 2001, but was completed on September 17, 2001, according to Complainant. (CX-5). Complainant testified Jamison never left the shipping office, although he completed the post-trip inspection report of Truck No. 2 and told Complainant to go "finish the pre-trip." (Tr. 39; CX-5). Complainant left the office and drove Truck No. 2 across the parking lot to unhook the trailer from Truck No. 1. (Tr. 39). Complainant determined, during the pre-trip inspection, that the windshield wipers were in bad condition; the rubber was coming off and the metal blades were rubbing the windows. (Tr. 40). Complainant, thereafter, informed Jamison that the wipers were bad and needed repair pursuant to FMCSRs 393.7 and 393.78.

Complainant expressed his concerns to Jamison that not only had Jamison falsified the post-trip inspection report of Truck No. 2, the truck "needed necessary repairs for operation" of its windshield wipers, and he wanted them repaired. (Tr. 40). Complainant testified Jamison "got real aggressive" and then told him "undoubtedly, you just don't want to be here . . . just drive the damn vehicle of (sic) or go the hell home." (Tr. 40, LL 22-23). Complainant replied "That's not the issue, sir. The issue is the safety of the vehicle." (Tr. 40). Complainant added that Jamison should call Penske and have both of the trucks repaired. He testified Jamison "refused to do so." (Tr. 41). Complainant informed Jamison that "he was putting my own safety and the general public's safety, even the company's liability, at risk, including my CDL, which I have no accidents, no violations on. I had intended on investigating his opinions, no[t] only on the first vehicle, but the second vehicle also. And he told me, that's fine. Just go home." (Tr. 41, LL 6-11).

Complainant completed his paperwork and placed "out-of-service" signs on both Truck No. 1 and Truck No. 2. Complainant's pre-trip inspection report for Truck Nos. 1 and 2 revealed defective brakes and bad windshield wipers, respectively. (Tr. 41, 44; CX-6; CX-10 and CX-11). Complainant testified he was unable to finish the pre-trip inspection report or check the safety equipment on Truck No. 2 because he "was mandated to go home." (Tr. 42). Complainant also prepared a post-trip inspection report reflecting zero miles on Truck No. 2 and marking it "out-of-service" because of defective wipers. (Tr. 42; CX-7; CX-10; CX-11).

According to Complainant, Truck No. 2 was thereafter driven by John Williams to Penske to have the wipers repaired. The repairs to Truck No. 2 were more extensive than wipers and included greasing the fifth wheel, defective or inoperable tail lights and brake lights in addition to the windshield wipers being replaced. (Tr. 43; CX-8). Complainant testified the repairs of the above items were made to safety items that precluded the operation of the vehicle pursuant to FMCSRs 396.11 and 396.13. (Tr. 43; CX-9). Complainant testified no other employees were present when he was told to either drive the truck or go home. (Tr. 45).

On September 17, 2001, after leaving the Respondent's premises, Complainant then telephoned the Department of Public Safety of the State of Alabama and spoke with Officer Marie Mannis at about 10:30 a.m. He expressed concern over the "safety of himself and others and the general public about the opinions and actions of [Respondent's] management." (Tr. 46). He asked to file a complaint. (Tr. 47). At about 11:10 a.m., Complainant also called the Federal Motor Carrier Safety Administration in

Montgomery, Alabama and spoke to an officer by the name of Theresa. He informed her of the issues and concerns of safety raised over Respondent's trucks and informed her that he wanted to start the process of filing a complaint against Respondent. (Tr. 47).

The following day Complainant again called the Federal Motor Carrier Safety Administration in Montgomery, Alabama and spoke to Officer Karen Brooks and asked that an official investigation be commenced against Respondent. (Tr. 48). Ms. Brooks informed him in the event that he was terminated by Respondent that he should call the "Wage and Hour Board," the Equal Opportunity Commission, as well as apply for unemployment compensation "to dignify a wrongful termination." (Tr. 49).

At about 1:00 p.m., Complainant then called Jim Ramia, Respondent's Office Manager. He asked Ramia for the phone number of "Federal Motor Carriers Consulting, Inc.," the consulting firm which advises Respondent on its actions. (Tr. 50). He also informed Ramia he contacted the Federal Motor Carrier Safety Administration and had started a complaint process. (Tr. 50). Complainant testified that at 2:07 p.m., Jamison telephoned his home, which he had never done before, and asked Complainant to "come in" for a meeting to discuss the events of the preceding day. Complainant agreed to do so. (Tr. 51). Complainant testified that at about 2:18 p.m., Ms. Jeffcoat telephoned "to warn" him that he was not going to like the outcome of the meeting and he should bring a tape recorder with him to the meeting. Complainant stopped at Wal Mart and purchased a tape recorder on his way to the meeting. (Tr. 52). When he arrived at the company for the meeting, Complainant asked Ms. Jeffcoat to join him in the meeting, however, she would not do so. (Tr. 52).

Complainant testified that present for Respondent at the meeting were Mr. Montgomery (Chief Operations Manager of Respondent, Tarrant Distribution), Mr. Hildegarden (Human Relations Director), Jamison and Marcus Williams. Mr. Montgomery suggested that Jamison proceed with the meeting. (Tr. 52-53). Complainant testified Jamison then opened a folder and pulled out a reprimand with the regulations given to him the day before by Complainant, at which time Complainant presented his tape recorder and turned it on. The tape recording of the meeting was transcribed by Michelle Roberts, no relation to Complainant, a court reporter, and is set forth in Complainant's Exhibit No. 15. Complainant testified the transcription is an accurate portrayal of the events of the meeting. (Tr. 54). Complainant was terminated by Respondent. (Tr. 55).

Complainant stated that at the time of his termination, he earned $11.00 an hour at regular rate and time and one-half after 40 hours or $16.50 an hour for overtime hours. He averaged 52.5 hours per week or $646.25 per week. (Tr. 55). He was also eligible for a safety bonus of $300.00-400.00 per year. (TR. 56). Complainant was also entitled to two weeks of vacation at his regular weekly rate of pay of $440.00. (Tr. 56). He testified the total of his lost wages and safety bonus since his September 18, 2001 discharge was $33,100.00. (Tr. 57).

After his termination, Complainant worked contractual jobs for interim employers. A list of interim employers and earnings in the amount of $2,560.15 are reflected in Complainant's Exhibit No. 16. (Tr. 57). Thus, Complainant is claiming loss benefits totaling $30,539.85. (Tr. 58). Complainant made himself available for the investigation of his complaint and spent time with the investigator in preparation for the prosecution of his complaint. (Tr. 58). He testified his marriage has been strained by his termination from employment and he was humiliated because he was doing his job in pointing out safety concerns to the Respondent. Complainant "was done wrong" and he wants "it made right." He had never been fired from any previous employer. (Tr. 58). Complainant desires reinstatement to his former job with Respondent. (Tr. 61).

On cross-examination, Complainant testified that Respondent's Exhibit No. 1, the post-trip inspection report for Truck No. 1, revealed a 380-mile difference between the odometer reading and the inspection report mileage. (Tr. 62). Complainant drove the same truck on Friday, September 14, 2001, with a post-trip mileage of 22,997. (Tr. 64-65; RX-2). Respondent's Exhibit No. 1 revealed an ending mileage total of 22,359 miles on September 15, 2001, and a total of 362 miles driven. (Tr. 65, 99; RX-1). The odometer reading showed 23,377 miles. (Tr. 98). Complainant concluded from the post-trip inspection report that the driver, Jones, did not do a physical post-trip inspection because of the incorrectly recorded mileage. (Tr. 66, 100).

Complainant testified he did not seek a full-time regular job until June 3, 2002, which is when he first applied for a full-time job. (Tr. 69). Prior to June 3, 2002, he was working on his complaint and doing contractual work. He only drove commercially for the Respondent. (Tr. 70).

Complainant testified that at the September 17, 2001 meeting, after he turned on his tape recorder, Jamison did not give him the reprimand that he pulled from his file. Complainant testified Randall Stone, a fellow employee, telephoned him at home on September 17, 2001 about concerns and Complainant being sent home.

Employee Hall also called him at home to verify that Roberts had been sent home by Respondent. (Tr. 74).

He testified he had refused to drive trucks before September 17, 2001, when Mr. Stone was his supervisor and also after when Jamison was his supervisor. He was never told the proper procedure, in the absence of a post-trip inspection report, was to perform a short trip and then complete a pre-trip inspection report. (Tr. 75). He testified that even after Jamison became the manager, a post-trip inspection report was required and the previous driver was called in to do the inspection. (Tr. 76-77). He stated that if the trucks on which he was assigned did not require repairs, he would have performed a short trip and prepared a pre-trip inspection report. However, on September 17, 2001, Complainant's understanding was that Respondent's policy was to call in the driver who failed to properly complete a post-trip inspection report. (Tr. 77).

Jamison informed him that a post-trip inspection report was not mandatory or necessary to operate a vehicle. (Tr. 79). Complainant disagreed with Jamison's opinion. Complainant stated as far as he knew there was no change in the company's procedure in the absence of a post-trip inspection report "from Mr. Stone to Mr. Jamison." (Tr. 79). On September 19, 2001, a memo was issued to all drivers establishing a new policy that conforms to the requirement to perform a short trip and prepare a pre-trip inspection report. (Tr. 79-80; CX-14).

In his pre-hearing deposition, Complainant confirmed there was another incident in which Jamison completed a report without inspecting the vehicle and Complainant prepared a pre-trip inspection report and drove the truck. Complainant disputed that the company's procedure had changed under Jamison as reflected in this first incident. (Tr. 80). He explained that on that occasion the truck required no repairs. (Tr. 81). He affirmed FMCSR 396.11 or the interpretation of that section mimics the company's policy as announced in the September 19, 2001 memorandum regarding performing a short trip and preparing a pre-trip inspection report. (Tr. 83-84). He testified, however, the policy or interpretation was not set forth in the regulation given to him by Mr. Stone when he was hired. (Tr. 84).

Complainant testified he refused to drive Truck No. 1 because of the brake problem. If there had been no brake problem after a pre-test, he would have operated the truck. (Tr. 84-85). He stated Truck No. 2 had dry-rotted wipers and Jamison asked him to drive the truck to the Penske facility to have the wipers replaced. (Tr. 86). He acknowledged that Penske's location was nine miles

from Respondent's facility and there was no threat of rain when he was asked to drive the truck. Complainant testified, however, that driving the truck was not safe because there was no post-trip inspection report and bad windshield wipers. (Tr. 86-87). Complainant acknowledged the "falsified" report completed by Jamison did not have a "check" in the certification box signifying that an inspection was done and the truck was road-worthy. (Tr. 88-89; CX-5).

Complainant testified other drivers refused to drive trucks. Randall Stone refused to drive a truck the very next day after Complainant's termination and Stone was not fired. (Tr. 89).

On re-direct examination, Complainant confirmed there had been frequent occurrences where post-trip inspection reports were not being completed by drivers. (Tr. 90). Complainant also confirmed that during September 17, 2001 meeting, Jamison stated doing a pre-trip inspection report takes precedent over a post-trip inspection report. (Tr. 91). Complainant remarked Respondent's position that a pre-trip inspection cleared a driver, where an inadequate or no post-trip inspection report existed, lessened the value of the post-trip inspection. (Tr. 91). Complainant informed Respondent that the FMCSRs required a post-trip inspection be done, except in unusual circumstances. (Tr. 91). Complainant confirmed he intended to abide by the FMCSRs. (Tr. 92).

According to Complainant, under the FMCSRs, and as a driver with a CDL license, he is required to explain any terminations from prior truck driving jobs. In applying for the four full-time regular jobs that he sought after June 3, 2002, he annotated the reason for his departure from Respondent as a termination. (Tr. 92). Complainant testified when Jamison told him to "drive the damn vehicle or go the hell home," he understood Jamison wanted him to drive the truck on its route, "not to take it to Penske." Only afterwards did Jamison ask him to drive the truck to Penske for repairs, which he refused to do because it would have been a safety violation of the FDMCSRs to drive Truck No. 2 with broken windshield wipers, whether on a rainy or sunny day. (Tr. 104-105).

Lily Jeffcoat

Ms. Jeffcoat testified that she has been employed by Respondent for six years as a driver and also helps train drivers. (Tr. 108).

On the morning of September 17, 2001, Roberts informed her that there was an improper post-trip inspection report in the truck that he was assigned to drive that morning. (Tr. 108). She asked

Roberts if she could do an "in-house" inspection on the vehicle, to which he agreed. (Tr. 109). While performing the in-house inspection, Ms. Jeffcoat found an air leak in the brakes, which Complainant could not seal. She marked the truck "out-of-service." (Tr. 109; CX-1). Ms. Jeffcoat had been handling the absence of post-trip inspection reports in this manner for about two years. (Tr. 109). She testified this procedure was followed even when Mr. Stone was the manager in charge of the facility. (Tr. 110).

Ms. Jeffcoat telephoned Jamison about the missing post-trip inspection report and he indicated that a pre-trip inspection report should be done. Jameson then spoke with Roberts. (Tr. 111).

Ms. Jeffcoat testified Roberts telephoned Penske to have a mechanic inspect the air leak in the brakes. (Tr. 111). Roy Morrison of Penske arrived at the facility shortly thereafter, but did not repair the air leak. (Tr. 112). Morrison put the truck back in service. (Tr. 113). Ms. Jeffcoat "pulled the glad-hands off," looked at the rubber, put them back together and again put the truck "out-of-service" immediately. (Tr. 112). Ms. Jeffcoat testified that after Jamison arrived at the facility, he and Roberts talked and they were getting upset with each other. (Tr. 113). Complainant did not want to drive the assigned truck because there was no post-trip inspection report. Roberts also complained that Roy Morrison had not done his job properly and was "being a butt hole." (Tr. 114). Ms. Jeffcoat testified she did not hear Jamison state that the federal regulations were a "bunch of bullshit." (Tr. 114). Ms. Jeffcoat prepared a second trip report since Morrison had placed the vehicle back in service. The second trip report was prepared for purposes of having the vehicle repaired. (Tr. 114; CX-2).

Roberts was then assigned a second truck, but complained about the absence of a proper post-trip inspection report. (Tr. 115). Ms. Jeffcoat found two post-trip inspection reports in the vehicle. (Tr. 115-116; RX-3). One post-trip inspection report was dated September 5, 2001 and the second report was dated September 10, 2001, signed by Jamison, but completed by Ms. Jeffcoat. (Tr. 125-126; CX-5). She stated Jamison does not drive trucks. (Tr. 126).

Ms. Jeffcoat testified she did not hear Jamison tell Roberts to either drive the truck or "go the hell home," nor did Complainant relate to her that Jamison so directed. (Tr. 116). She recalled Jamison stating "I think it's best if [Roberts] just went home," to which Roberts responded "I think you're right, because I'm getting upset." (Tr. 117).

Ms. Jeffcoat testified she did not recall telephoning Roberts on September 18, 2001. (Tr. 117). She specifically denied telling Roberts that he was being set up or that he should bring a tape recorder to the scheduled September 18, 2001 meeting. (Tr. 117). Ms. Jeffcoat testified she has put 50 trucks "out-of-service" and has received no discipline for such action. She is not aware of any other employees being disciplined for putting trucks "out-of-service." (Tr. 117-118).

On cross-examination, Ms. Jeffcoat testified Truck No. 1 had a post-trip inspection report that was improper because there was an 18-mile difference in the ending mileage and the odometer reading. (Tr. 119, 122; RX-1). She acknowledged the post-trip inspection report was an improper report because the mileage was incorrect. (Tr. 121). According to Ms. Jeffcoat, normally when an improper inspection report is found, a certified driver will perform an inspection of the vehicle "and then you do another one behind it." (Tr. 120). A post-trip inspection report with inaccuracies occurs once a week out of 15 trucks at Respondent's facility. (Tr. 120-121). Ms. Jeffcoat stated when she checked the brakes of Truck No. 1, she found them defective. The brakes did not meet the FMCSRs and Truck No. 1 could not be driven until the brakes were fixed. (Tr. 122-123). Ms. Jeffcoat marked Truck No. 1 "out-of-service" and would not have advised Roberts to drive the vehicle. (Tr. 123).

Complainant informed Ms. Jeffcoat that he was going to put the second truck out-of-service because of the windshield wipers. (Tr. 128). Ms. Jeffcoat acknowledged that if the condition of the windshield wipers is hazardous to drive under "road conditions at the time," the vehicle should be marked out-of-service. She, however, did not agree that the defective wipers were a reason to put Truck No. 2 out-of-service because there was not a cloud in the sky and it was not raining. In her opinion, Truck No. 2 was not unsafe to drive under the existing weather conditions. (Tr. 130, 136). She confirmed that Truck No. 2 also had defective parking brakes and parking lights. (Tr. 130-131).

Ms. Jeffcoat acknowledged the post-trip inspection report for Truck No. 2 dated September 10, 2001 was filled out by her, however, she did not sign nor certify the report. (Tr. 132-133). She performed an "in house" inspection for a driver named "Al" a few weeks before because of a missing post-trip inspection report. (Tr. 137). She was not aware of any changes in company policy regarding post-trip inspections before Roberts was terminated, because "that's the way I always did it." (Tr. 137). The "in house" inspection was the same procedure as described in the company memorandum issued after Complainant's termination. (Tr.

138; CX-14). Neither Mr. Stone nor Jamison informed Ms. Jeffcoat that an "in house" inspection could be done in the absence of a post-trip inspection report. (Tr. 138).

Roy Morrison

Mr. Morrison (herein Morrison) is the service manager for Penske and has worked for Penske for 22 years. Respondent is a customer of Penske. (Tr. 140). On September 17, 2001, he was telephoned at home concerning an air leak of a "unit" at Respondent's facility. He went by the facility on his way to work to check on the truck. (Tr. 141).

He testified he checked the "glad-hand," which are the connections between the truck and the trailer and found no indication of an air leak. He could not duplicate any problems. He also testified that he found no brake defects. (Tr. 142-143).

Morrison testified he got into a confrontation with Complainant over a post-trip inspection report. He told Complainant that the truck was operable and there was no reason why the truck should be deadlined. (Tr. 143). Morrison and Roberts returned to the truck and attempted to duplicate the air leak in various ways, but could not do so. (Tr. 143-144). Roberts informed him that he could not drive the truck because of the post-trip inspection report of the previous driver. (Tr. 144). Morrison recalled talking to Lily Jeffcoat at the facility who also confirmed that she had found an air leak on the truck. He did not ask Ms. Jeffcoat to show him how she found the air leak in the brake system. (Tr. 148-149).

After arriving at the Penske facility, Morrison testified that Jamison telephoned him and asked what had taken place that morning. He informed Jamison that the discussion was more about a previous driver not doing his job by completing a post-trip inspection report, preventing Roberts from performing his job. Jamison asked Morrison if he thought the truck may have problems and if the seals of the glad-hand should be replaced. Jameson also asked him to replace the rubber seals in the "glad-hand" to permit the use of the vehicle. (Tr. 146). Morrison then sent a mechanic to the Respondent's facility and replaced the seals of the "glad-hand." (Tr. 147).

On cross-examination, Morrison testified that he checked the brake system three different ways for 20-30 minutes and was unable to find an air leak or any defects in the brake system. (Tr. 149-150). He acknowledged that two drivers had found the brakes leaking. He testified he asked Roberts to show him where he found

the brakes leaking, but Roberts could not show him an air leak. (Tr. 150).

Jimmy Ramia

Mr. Ramia (herein Ramia) is presently the Respondent's distribution manager. (Tr. 153). On September 18, 2001, he was Respondent's office manager. He testified he could not recall Roberts telephoning him on September 18, 2001 to relate that he had filed charges against Respondent for safety violations regarding the events of September 17, 2001. (Tr. 154).

On cross-examination, Ramia testified that Roberts telephoned him "after the incident" about a letter of termination and sought the reason for his termination. (Tr. 154, 158). He referred Roberts to the corporate personnel director and also informed Mr. Ron Montgomery, the manager, of the conversation. Ramia testified Jamison had informed him Complainant did not go on his scheduled run on September 17, 2001, and Jamison was upset about it. (Tr. 155).

Ramia testified "Motor Carrier Consultants, Inc." is a company which takes care of Respondent's records. He did not recall Roberts telephoning him on September 18, 2001 and requesting the phone number for the consulting firm. (Tr. 156). Ramia also testified he does not recall Roberts telling him of the outside complaints which he had filed with OSHA and the Federal Motor Carrier Safety Administration. If Roberts had informed him, Ramia would have told his boss of such a conversation. (Tr. 159).

Jim Jamison

Jamison became the Operations Manager for Respondent on May 30, 2001. As operations manager, he is in charge of trucks and drivers to deliver Respondent's products. He has been in the trucking industry since 1979. (Tr. 160). Jamison began in the trucking division of Country Pride, which was a small operation, but in 1982 he went to work for McCarty Farms where he was in charge of distribution and supervised 26 drivers. He was totally responsible for setting up and implementing McCarty's transportation department and bringing it within DOT guidelines. He later worked for Kelly Lynn, a nationwide refrigerated carrier, where he had 60 drivers under his supervision and was responsible for dispatch and DOT compliance. (Tr. 161).

On September 17, 2001, Jamison received a telephone call from Ms. Jeffcoat informing him that there was a problem with a post-trip inspection report. He informed Ms. Jeffcoat to tell Roberts to do a short trip and then a pre-trip inspection report which would suffice for a post-trip inspection report. (Tr. 162). Ms. Jeffcoat asked him to relay that information to Roberts. Jamison testified that after he explained the procedure, Roberts asked him three times, each time with more volume in his voice, if he was telling him to drive the truck. (Tr. 162).

Jamison testified the procedure of performing a short trip followed by a pre-trip inspection report was the same procedure used by Mr. Stone, his predecessor, and the same procedure that he has used since he has been Operations Manager at Respondent. (Tr. 162-163). Respondent's Safety Representative, Mr. Jimmy Potter, informed Jamison that the short trip followed by a pre-trip inspection report was how it was handled in the absence of a post-trip inspection report. (Tr. 163).

Jamison testified Miller Carrier Consultants, Inc. is a company which assists Respondent in the preparation and maintenance of its log books and compliance with DOT regulations. (Tr. 163). Jamison had previously consulted with Miller on a similar situation which occurred with Complainant before September 17, 2001, but he never encountered this specific situation and was not sure what "we should do." He called upon Miller and discussed the situation with Mr. Jim McNeill, the owner of Miller. (Tr. 163-164). Mr. Potter directed him to published guidelines concerning the identical situation in the Federal Motor Carrier Safety Regulations Handbook, Question 14. (Tr. 164-165; RX-4, p. 3).

Upon arriving at work on September 17, 2001, Jamison was informed by Ms. Jeffcoat or Roberts that Truck No. 1 had been placed "out-of-service" because of an air leak, and that Morrison had been called out, but could not find the air leak. (Tr. 166). He telephoned Morrison who related he could not duplicate the air leak, and, in discussions with Complainant, Morrison was informed the "root of the problem was the DVIR" and Roberts was not too concerned about the air leak. (Tr. 166-167). Morrison told Jamison the truck was "road-ready" and there was nothing wrong with the brakes. (Tr. 167). Since Jamison had two drivers telling him the truck had an air leak, he asked Morrison to "thoroughly" check out Truck No. 1. (Tr. 168).

Jamison stated Roberts may have handed him copies of the FMCSRs that morning because Complainant had done so in the past several times. He testified he did not refer to the Federal Motor Carrier Safety Regulations as a "bunch of bullshit." (Tr. 167).

He then instructed Roberts to use Truck No. 2. Roberts also marked Truck No. 2 "out-of-service" because of dry-rotted windshield wipers. (Tr. 169). Jamison then remarked "It's a beautiful day. Just take it on down to Penske, and they will replace the wipers." Complainant stated he was putting Truck No. 2 "out-of-service." (Tr. 169). Jamison stated he was "astounded" by Complainant's action and informed Roberts "It may be time for you to go home." (Tr. 169). Roberts responded "I think you're wrong." Jamison denied telling Roberts to drive the truck or go the hell home. Jamison testified that he did not recall Roberts remarking that he was going "to investigate [Jamison's] actions to the fullest extent." Jamison testified he never refused to have the two trucks repaired. (Tr. 170-171).

Complainant was scheduled to work on September 19, 2001. Mr. Montgomery requested that Jamison set up a meeting with Roberts on September 18, 2001. (Tr. 171). According to Jamison, the purpose of the meeting was to review the events of September 17, 2001, and "to make sure that everybody was on board for the procedures that we were to follow at similar events, occurrences in the future." (Tr. 172, LL 7-9). Jamison testified that to his knowledge there was no intention to fire Roberts going into the meeting. (Tr. 172).

The meeting was attended by Mr. Montgomery, Barry Hildegardner, Roberts, Jamison and Mr. Williams. (Tr. 172). At the meeting, Complainant produced a tape recorder and announced he intended to record the meeting. Mr. Hildegardner asked him not to do so, however Complainant stated he was going to record the meeting. Jamison testified a discussion ensued about the events of the previous morning and "what we needed to do to make sure that everybody was on board in the future." (Tr. 173, LL 5-6). Roberts refused to follow the procedures announced at the meeting. According to Jamison, Mr. Hildegardner terminated Complainant's employment at the end of the meeting. (Tr. 173).

Jamison testified Roberts is not the only driver to put a truck "out-of-service," other drivers have marked trucks "out-of-service," and he has never disciplined a driver for putting a truck "out-of-service." (Tr. 173). Jamison affirmed that Ramia did not tell him Roberts filed charges with the Federal Motor Carrier Safety Administration against Respondent. (Tr. 175).

Jamison distributed a memorandum on September 19, 2001, which directed all drivers, in the absence of a post-trip inspection report, to perform a short trip followed by a pre-trip inspection report. (Tr. 174; RX-5). He testified the reason the memorandum had not been distributed before September 19, 2001, was that the procedure:

> "was understood and everybody knew what to do. I say everybody. It was widely understood. But just to take any kind - - if anybody had any questions about anything, we'd put it in writing. The reason we didn't do it earlier is because I didn't feel like I wanted to validate or have anybody think that I was validating not doing the DVIR. We still required the DVIR. This is just what to do if, in the rare circumstance, one was not totally completed or totally 100% corrected. This was the procedure that we were to follow.

(Tr. 175, LL 7-16).

On cross-examination, Jamison testified the FMCSR 392.7, "Equipment Inspection and Use," states that a driver is not to drive a vehicle unless the driver satisfies himself that listed parts and accessories (including windshield wipers) are in good working order. Jamison affirmed the regulation does not mention weather conditions, but he believed common sense would apply. (Tr. 176-177). Jamison testified Roberts did not operate the truck with defective wipers "and that was fine." He did not force Roberts to operate the truck and did not threaten him "to operate it," or for not operating the equipment. (Tr. 178).

Jamison's position at the September 18, 2001 meeting was that a short trip followed by a pre-trip inspection report overrides a post-trip inspection report and would suffice. (Tr. 179). Complainant disagreed with Jamison's position. He acknowledged the 18-mile difference which was evident on Truck No. 1 would require a post-trip inspection report. (Tr. 182).

Jamison disputed that incomplete post-trip inspection reports happened every week, and stated it was only a coincidence that the two trucks assigned to Complainant on September 17, 2001, both had inadequate post-trip inspection reports. He confirmed Complainant's position throughout the events surrounding this case was that Respondent was not enforcing its rules and regulations requiring drivers to complete post-trip inspection reports, which resulted in more and more inadequate post-trip inspection reports, and he wanted Respondent to implement enforcement of the requirement that a post-trip inspection report be prepared by drivers of Respondent. (Tr. 184).

Jamison affirmed that at the September 18, 2001 meeting, Roberts generally stated he would abide by the FMCSRs. (Tr. 184). Jamison was surprised and shocked that Roberts was fired.

Complainant was fired because he would not agree to a "legal request" that he abide by the "DOT and the company procedures." (Tr. 185). Jamison recalled that each time Roberts was asked if he would follow company procedures he gave a "meandering answer that nobody could follow." (Tr. 186).

Jamison acknowledged that both trucks assigned to Complainant were marked "out-of-service" for deficiencies that the FMCSRs dictate precluded their operation. (Tr. 186-187). The entire FMCSRs Handbook was received into evidence as RX-6, however Respondent could not identify the interpretive rationale or protocol used for interpretations of the FMCSRs.[2] (Tr. 189-190).

Under questioning from the undersigned, Jamison affirmed that the post-trip inspection report dated September 10, 2001 (CX-5), which he signed but did not complete, was not a valid post-trip inspection report. (Tr. 192). Jamison could not explain why he signed the report nor the intent of doing so. (Tr. 192-193). The report was dated seven days before Complainant refused to drive the truck. Jamison confirmed he did not drive the truck for a short trip and the report was not represented to be a pre-trip inspection report. Jamison testified that "we didn't use it [the report] for anything. I didn't know it existed." (Tr. 193). Jamison stated that a written reprimand was discussed, but Mr. Hildegardner concluded he did not have grounds for a reprimand or for termination. Jamison did not present any reprimand at the meeting. (Tr. 197). Respondent's attendees met before the meeting to discuss its purpose which was "about making sure that we were all on the same page, as far as how to handle–-if a DVIR is not–-." (Tr. 198). Jamison had Roberts scheduled for work on September 19, 2001, however he was instructed to call Complainant to attend a meeting scheduled by his "boss" on September 18, 2001. (Tr. 199-200).

The September 18, 2001 Meeting (Transcript)

The transcript of the meeting begins with Mr. Hildegardner and Roberts discussing the presence of the tape recorder and whether the meeting will proceed. (CX-15, pp. 1-2). Roberts informed the meeting attendees that he had already contacted Department of

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[2] In further response, Respondent's attached to its post-hearing brief is a summary of interpretive guidance reported at 62 FR 16370 which is intended to "provide the motor carrier industry with a clearer understanding of the applicability of many of the requirements contained in the FMCSRs in particular situations.

Transportation. Mr. Hildegardner refused to permit Complainant to continue taping the meeting. Roberts refused to turn the recorder off which elicited a response from Mr. Hildegardner to Ron [Montgomery] "if you're [Roberts] not going to cooperate, then I think Ron–-I don't see how this employee/employer relationship can continue." (CX-15, p. 3).

Roberts stated that the problem "is having every driver do what they're supposed to daily, and that is what I've been doing, and that is proper inspection, reviewing the last [post-trip] filled out by the driver." Unavailable post-trip inspection reports "happen every day," not once a month or every two months, according to Complainant. (CX-15, pp. 4, 6-7). If a post-trip inspection report was not available, Complainant would wait for a post-trip "filled out by the driver that drove the truck the day before." In the event of the prior driver's death, Complainant stated "that would be an extreme incident where [another agent] could fill one out." (CX-15, p. 5).

Mr. Hildegardner again remarked to Mr. Montgomery ". . . sounds like this gentleman's not happy working with this company . . . I don't know if ya'll can continue that relationship or not." (CX-15, p. 9). Jamison confirmed that he had never had this particular situation come up in 20 years "being around trucks," but [the situation] "comes up with him [Complainant], and it comes up repeatedly. (CX-15, p. 9). Jamison stated that the 18-mile discrepancy on a truck assigned to Complainant the day before was explained by "a newer driver carried it back over to Penske to get the unit worked on and brought it back." Jamison had no knowledge of the driver driving the truck to Penske, and he would have had to "start at the top of the list and work my way down [to call the driver in to complete a post-trip inspection report]. It's asinine." Roberts responded that the regulations require "for each trip, each vehicle, you need a post-trip. That's what it says." (CX-15, p. 10).

Mr. Hildegardner again raised the scenario "if there's not a post-trip available," a pre-trip can be done rather than not using the truck. However, Roberts reiterated that the regulations require the driver to review the last post-trip inspection report. (CX-15, p. 14).

Mr. Montgomery acknowledged that Respondent should be dealing with drivers who are not doing post-trip inspection reports. Roberts asked "So, why haven't we?" (CX-15, p. 17). Mr. Hildegardner queried if a post-trip inspection report is not available and it is time for another trip, should Respondent "take a truck out of service until we get a post-trip or do we do a pre-

trip and move on?" (CX-15, p. 18). Roberts responded that "the pre-trip does not override the previous day's post-trip," to which Jamison stated "According to Motor Carriers, it does." Roberts remarked that "Motor Carriers is not the Department of Transportation. And that's where we are." Jamison stated the information Roberts had provided to him the day before "was so bogus," about which Roberts reminded he stated "it was all bullshit." (CX-15, p. 19).

A brief discussion ensued about Truck No. 2 being taken "out-of-service" because the passenger-side windshield wiper was in disrepair. (CX-15, pp. 20-21).

Mr. Hildegardner stated he had no problem with these concerns, "if the DOT wants to discuss these matters with us or if it comes up in an audit, that's fine." He then asked Roberts "are you going to work with management here?" Complainant replied "I have no problem working with the management." Mr. Hildegardner raised Complainant's "attitude" and stated "I don't know why you'd want to work here." Mr. Montgomery also commented "I don't know why you want to work here." Roberts was then asked "Why do you want to work here?" by Mr. Hildegardner. Mr. Montgomery noted that "there's nothing you like about this company," mentioning specifically the bonus plan and insurance. (CX-15, pp. 22-23). He suggested Roberts did not have to work for Respondent. (CX-15, p. 23). Roberts responded he brought the tape recorder because "it's just a set deal. I knew this was going to, and I understand it . . . it's not a mystery." He stated "the driver dignifies before the truck goes down the road that I'm looking out for our best interest as people . . . the general public." Jamison noted "where we're at is a Mexican standoff with you." (CX-15, p. 24). Jamison stated Penske informed that they spend a lot of time "running down . . . ghost problems for Mr. Roberts" which Complainant responded was a false accusation. (CX-15, p. 24).

Mr. Hildegardner informed Roberts that if he could not abide by Respondent's position "then you need to seek other employment." Complainant replied that he would continue to do DOT inspections as DOT regulations mandate. (CX-15, p. 28). Jamison stated that he had been informed by competent authority that Roberts could do a pre-trip inspection which takes precedence over a post-trip and once a pre-trip inspection is done, "you are clear." (CX-15, pp. 29-30). Complainant disagreed. Mr. Hildegardner stated "If you're not going to comply with that - - I'm going to give you choice." Roberts replied that he was "going to go by the DOT regulations." (CX-15, p. 30). When queried again about complying with Respondent's position, Complainant stated "I will not go out without that post-trip and without it being correct and without

reviewing it and seeing if there's any defects on it. No, I will not." (CX-15, p. 31). Roberts further clarified that the post-trip inspection report had to be "signed by the driver, not by another agent that does not –- is not certified to drive a Class A truck." (CX-15, p. 32).

Mr. Hildegardner again asked Roberts if he would do a pre-trip and take a truck out in the absence of a post-trip if he is instructed he can do that by the company. Roberts responded he would not "take civil liability for ya'll." (CX-15, pp. 32-33). Mr. Hildegardner then terminated Complainant. (CX-15, p. 35).

IV. DISCUSSION

A. Credibility

Prefatory to a full discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. See Frady v. Tennessee Valley Authority, Case No. 92-ERA-19 @ 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his evidence worthy of belief." Indiana Metal Products v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971). As the Court further observed:

> Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe . . . Credible testimony is that which meets the test of plausibility.

442 F.2d at 52.

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the

testimony. Altemose Construction Company v. NLRB, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975).

Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and the demeanor of witnesses.

Complainant's burden of persuasion rests principally upon his testimony. His **prima facie** case is corroborated by the testimony of other witnesses. I found Complainant generally an impressive witness in terms of confidence, forthrightness and overall bearing on the witness stand. I found his testimony to be straight-forward, detailed and presented in a sincere and consistent manner.

Respondent's witnesses were not as impressive in my view. Jeffcoat's demeanor belied her testimony in crucial areas such as her selective recollection of the Roberts-Jamison office conversation on the morning of September 17, 2001. I was not favorably impressed with her failure to recall telephoning Roberts on September 18, 2001, but denying she alerted him about the meeting and the need for a tape recorder. Ramia's testimony was only a catalogue of non-recollection which was unpersuasive. Jamison did not impress me as sincere in his testimony. His testimony regarding the September 10, 2001 post-trip inspection report was incredulous which tempered my view of much of his remaining testimony.

Respondent's argument that the decision maker in this matter, Mr. Hildegardner, was unaware of Complainant's protected activity, and thus could not have acted in a discriminatory manner, is not persuasive. Mr. Hildegardner did not testify at the hearing and no explanation was given for Respondent's failure to call him as a witness other than he was unavailable. As the decision maker, his testimony was central to Respondent's actions and defense. Respondent's failure to call Mr. Hildegardner as a witness to explicate the reasons for Respondent's termination of Roberts diminished the strength of its defense and its alleged legitimate, nondiscriminatory business reasons for its actions.

B. The Statutory Protection

The employee protection provisions of the STAA provide, in pertinent part:

(a) Prohibitions. (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because –-

(A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or

(B) the employee refuses to operate a vehicle because –

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; **or**

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C. § 31105(a). Thus, under the employee protection provisions of the STAA, it is unlawful for an employer to impose an adverse action on an employee because the employee has complained or raised concerns about possible violations of DOT regulations. 49 U.S.C. § 31105(a)(1)(A). See, e.g., Reemsnyder v. Mayflower Transit, Inc., Case No. 93-STA-4, @ 6-7 (Sec'y Dec. and Ord. On Recon. May 19, 1994). Furthermore, it is unlawful for an employer to impose an adverse action on an employee who has refused to drive because operating a vehicle violates DOT regulations **or** because he has a reasonable apprehension of serious injury to himself or the public. 49 U.S.C. § 31105(a)(1)(B).

The purpose of the STAA is to promote safety on the highways. As noted by the Senate Commerce Committee which reported out the legislation, "enforcement of commercial motor vehicle safety laws and regulations is possible only through an effort on the part of employers, employees, State safety agencies and the Department of Transportation." 128 Cong. Rec. S14028 (Daily ed. December 7, 1982). The Secretary has recognized that "an employee's **safety** complaint to his employer is the initial step in achieving this goal . . . an internal complaint by an employee enables the employer to comply with the safety standards by taking corrective action immediately and limits the necessity of enforcement through

formal proceedings." (Emphasis added). Davis v. H. R. Hill, Inc., Case No. 86-STA-18 @ 2 (Sec'y Mar. 19, 1987).

C. The Burden of Proof

To prevail on a whistleblower complaint, a complainant must establish that the respondent took adverse employment action because he engaged in protected activity. A complainant initially may show that a protected activity likely motivated the adverse action. Shannon v. Consolidated Freightways, Case No. 96-STA-15, @ 5-6 (ARB Apr. 15, 1998). A complainant meets this burden by proving (1) that he engaged in protected activity, (2) that the respondent was aware of the activity, (3) that he suffered adverse employment action, and (4) the existence of a "causal link" or "nexus," e.g., that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. Clean Harbors Environmental Services, Inc. v. Herman, 146 F.3d 12, 21 (1st Cir. 1998); Kahn v. United States Sec'y of Labor, 64 F.3d 261, 277 (7th Cir. 1995).

A respondent may rebut this **prima facie** showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. The complainant must then prove that the proffered reason was not the true reason for the adverse action, but rather his or her protected activity was the reason for the action. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-508 (1993).[3]

However, since this case was fully tried on its merits, it is not necessary for the undersigned to determine whether Complainant presented a **prima facie** case and whether the Respondent rebutted that showing. See Roadway Express, Inc. v. Dole, 929 F.2d 1060, 1063 (5th Cir. 1991); Ciotti v. Sysco Foods Co. of Philadelphia, Case No. 97-STA-30 @ 4 (ARB July 8, 1998).

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[3] Although the "pretext" analysis permits a shifting of the burden of production, the ultimate burden of persuasion remains with the complainant throughout the proceeding. Once a respondent produces evidence sufficient to rebut the "presumed" retaliation raised by a **prima facie** case, the inference "simply drops out of the picture," and "the trier of fact proceeds to decide the ultimate question." St. Mary's Honor Center, 509 U.S. at 510-511. See Carroll v. United States Dep't of Labor, 78 F.3d 352, 356 (8th Cir. 1996)(whether the complainant previously established a **prima facie** case becomes irrelevant once the respondent has produced evidence of a legitimate, nondiscriminatory reason for the adverse action.)

Once Respondent has produced evidence in an attempt to show that Complainant was subjected to adverse action for a legitimate, nondiscriminatory reason,[4] it no longer serves any analytical purpose to answer the question whether Complainant presented a **prima facie** case. Instead, the relevant inquiry is whether the Complainant prevailed by a preponderance of the evidence on the ultimate question of liability. If he did not, it matters not at all whether he presented a **prima facie** case. If he did, whether he presented a **prima facie** case is not relevant. Somerson v. Yellow Freight System, Inc., Case No. 98-STA-9 @ 8 (ARB Feb. 18, 1999).

The undersigned finds that as a matter of fact and law, Respondent has attempted to articulate a legitimate, nondiscriminatory reason for its adverse action against Roberts. Respondent argues that Complainant was terminated because of his repeated refusal to agree to follow Respondent's policy and procedure concerning the inspection of trucks which have either incomplete or missing post-trip inspection reports. Respondent's policy was based upon Interpretations of the FMCSRs by the Department of Transportation. (See RX-6, p. 462). Thus, I find and conclude that Respondent met its burden of production to articulate a legitimate, nondiscriminatory basis for its adverse employment action.

Once Respondent has articulated a legitimate nondiscriminatory reason for its adverse employment action, the burden shifts to Complainant to demonstrate that Respondent's proffered motivation was not its true reason but is pretextual and that its actions were actually based upon discriminatory motive. Leveille v. New York Air National Guard, Case Nos. 94-TSC-3 and 94-TSC-4 @ 7-8 (Sec'y Dec. 11, 1995); Carroll v. Bechtel Power Corp., Case No. 91-ERA-46 @ 6 (Sec'y Feb. 15, 1995).

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[4] The respondent must clearly set forth, through the introduction of admissible evidence, **the reasons for the adverse employment action**. The explanation provided must be legally sufficient to justify a judgment for the respondent. Upon articulating some legitimate, nondiscriminatory reason for the adverse employment action or "explaining what it has done," Respondent satisfies its burden, which, as noted above, is only a burden of production, not persuasion. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253, 256-257; 101 S.Ct. 1089, 1093, 1095-1096 (1981). Respondent does not carry the burden of persuading the court that it had convincing, objective reasons for the adverse employment action. Id.

Complainant may demonstrate that the reasons given were a pretext for discriminatory treatment by showing that discrimination was more likely the motivating factor or by showing that the proffered explanation is not worthy of credence. Zinn v. University of Missouri, Case No. 93-ERA-34 @4 (Sec'y Jan. 18, 1996); Yellow Freight Systems, Inc. v. Reich, 27 F.3d 133, 1139 (6th Cir. 1994). As noted above, Complainant retains the ultimate burden of proving that the adverse action was in retaliation for the protected activity in which he allegedly engaged, and thus was in violation of the STAA.

D. The Protected Activity

Complainant's protected activity was "internal," i.e., complaints made to Respondent's management, Jamison, as well as "external" lodged with outside state and federal agencies. Complainant only alleged internal complaints as his protected activity in his pre-hearing complaint. He advanced external complaints at the hearing as additional protected activity.

It is well settled that the STAA protects safety-related complaints "that are purely internal to the employer." Ake v. Ulrich Chemical Co., Inc., Case No. 93-STA-41 @ 5 (Sec'y March 21, 1994); Clean Harbors Environmental Services, Inc. v. Herman, 146 F.3d at 19.

Section 405(a)(1)(A) of the STAA is referred to as the "complaint clause" which prohibits, inter alia, the discharge of an employee or discipline or discrimination against an employee regarding pay, terms or privileges of employment because the employee has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order. Protection under the complaint clause is not dependent on actually proving a violation of a commercial vehicle safety regulation, standard or order; the complaint need only relate to such a violation. Schulman v. Clean Harbors Environmental Services, Inc., Case No. 98-STA-24 @ 6 (ARB Oct. 18, 1999).

Prefatory to an analysis of the salient facts of this case, it is noted that throughout the events of this case Complainant's position was that Respondent was not enforcing DOT or its own rules and regulations requiring drivers to complete post-trip inspection reports. Respondent's failure to seek compliance resulted in more inadequate post-trip inspection reports. Roberts wanted Respondent to implement enforcement of the requirements that a post-trip inspection report be prepared by drivers of Respondent. Respondent, through Jamison, was fully aware of Complainant's

position. (Tr. 184). Moreover, Complainant clearly voiced this concern at the September 18, 2001 meeting with Respondent's officials.

1. The Refusal to Drive

A refusal to drive is protected under two STAA provisions. The first provision, 49 U.S.C. § 31105(a)(1)(B)(i), requires that Complainant show he refused "to operate a vehicle because--the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health . . . ." See Yellow Freight Systems, Inc. v. Martin, 983 F.2d 1195, 1199 (2d Cir. 1993). The second refusal to drive provision, 49 U.S.C. § 31105(a)(1)(B)(ii), focuses on whether a reasonable person in the same situation would conclude that there was a reasonable apprehension of serious injury "to the employee or the public because of the vehicle's unsafe condition." See Cortes v. Lucky Stores, Inc., Case No. 96-STA-30 @ 4 (ARB Feb. 27, 1998).

The STAA defines reasonable apprehension as:

> An employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. **To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition**.

49 U.S.C. § 31105(a)(2)(emphasis added).

In order to prevail on the merits of his claim, Roberts must prove that he engaged in activity protected by either or both of the foregoing provisions, and that he was terminated, at least in part, because of that protected activity. Byrd v. Consolidated Motor Freight, Case No. 97-STA-9 @ 4 n.2 (ARB May 5, 1998); Somerson, supra @ 8.

Complainant asserts that he refused to drive Trucks No. 1 and 2 because under the circumstances then existing, if he had done so, he would have violated FMCSRs §§ 392.7, 396.7, 396.11, 396.13 and 396.15.

Section 392.7, regarding "Equipment, inspection and use," provides "**no commercial motor vehicle shall be driven unless the**

driver is satisfied that the following parts and accessories are in good working order, nor shall any driver fail to use or make use of such parts and accessories when and as needed: (a list of parts/accessories follows which includes **service brakes and windshield wiper or wipers**).

Section 396.7 proscribes the "unsafe operations" of a vehicle in such a condition, e.g., an air leak in the brake system, "as to likely cause an accident or a breakdown of the vehicle."

Section 396.11 prescribes that:

> (a) "every motor carrier shall require its drivers to report, and every driver shall prepare a report in writing at the completion of the each day's work on each vehicle operated and the report shall cover at least the following parts and accessories," in pertinent part, **service brakes and windshield wipers**; and
>
> (c) Prior to requiring or permitting a driver to operate a vehicle, every motor carrier or its agent shall repair any defect or deficiency listed on the driver vehicle inspection report which would be likely to affect the safety of operation of the vehicle.

Section 396.13 states that "before driving a motor vehicle, the driver shall: (a) be satisfied that the motor vehicle is in safe operating condition; (b) review the last driver vehicle inspection report [DVIR]; and (c) sign the report, only if defects and deficiencies were noted by the driver who prepared the report, to acknowledge that the driver has reviewed it and that there is a certification that the required repairs have been performed.

Section 396.15 provides, with respect to post-trip inspections, "Motor carriers shall maintain practices to ensure that following completion of any trip in driveaway-towaway operation of motor vehicles in combination, and before they are used again, the towbars and saddle-mounts are disassembled and inspected for worn, bent, cracked, broken, or missing parts. Before reuse, suitable repair or replacement shall be made of any defective parts and the devices shall be properly reassembled.

I find that Roberts initially refused to drive Truck No. 1 because of an inaccurate post-trip inspection report. It is

undisputed that the post-trip inspection report for Truck No. 1 contain a mileage discrepancy, whether 380 or 18 miles. The inspection report of the previous driver reflected a written "OK" over the center column of three columns of items to be inspected and a "check" in the box certifying that all equipment listed in the columns was inspected and "found in satisfactory condition." (RX-1). Notwithstanding the foregoing, Roberts concluded the previous driver had not performed a physical inspection of the vehicle at the end of the trip because of the mileage discrepancy, and he was not satisfied that Truck No. 1 was in safe operating condition. He reported the inaccuracies to Ms. Jeffcoat, who agreed the inspection report was improper because the mileage was incorrect.

When Complainant raised the inaccuracies in the post-trip inspection report, he was unaware of the defective brakes. Ms. Jeffcoat detected the defective brakes during her "in house" inspection, a process to which Roberts had acceded. As a result, Ms. Jeffcoat marked the truck "out-of-service," thus precluding the necessity of Roberts having to drive the truck until repairs were effected.

Although Respondent argues that the "OK" notation and certification from the previous driver of Truck No. 1 should have satisfied Roberts's concern about the condition of the truck, even though there was a mileage discrepancy, the defective brakes belie its position. The discovery of the air leak contradicts the certification of the truck's condition and supports Roberts's safety concern that a physical post-trip inspection may not have been conducted. Obviously, the air leak was an unsafe condition which is not acceptable by FMCSRs standards and required repair.

Complainant also contends he refused to drive Truck No. 1 because of safety concerns related to defective air brakes. Although Roberts testified that he "could not drive" Truck No. 1 until the defective brakes were fixed, the record does not support a specific refusal to drive Truck No. 1 for that reason. Roberts did not specifically raise the defective brakes as a reason for not driving Truck No. 1 when he spoke with Jamison the morning of September 17, 2001. His testimony reveals he complained of Morrison's action and the lack of an adequate post-trip inspection report, bolstering his arguments by providing Jamison with copies of FMCSRs §§ 396.11 and 396.13 relating to post-trip inspection reports.

I credit the testimony of Roberts that, in response, Jamison stated the "regulations were all a bunch of bullshit." Although Ms. Jeffcoat stated she did not overhear the comment, which was

neither an affirmation or denial of the occurrence, and Jamison denied making such a statement, the meeting transcript reveals Jamison's reference to the same copied regulations as "bogus." Given the events of September 17, 2001, I find it more probable than not that Jamison made the statement attributed to him by Roberts.

The record is clear that Jamison did not request or demand that Complainant drive Truck No. 1 after the air leak in the braking system was discovered. Jamison telephoned Penske and sought repairs since he had received reports from Roberts and Jeffcoat that an air leak persisted, even though Morrison was of the opinion that the truck was "road ready." I find Complainant constructively refused to drive Truck No. 1, pursuant to FMCSR § 392.7, when he placed it "out-of-service" on September 17, 2001, because of the air leak in the braking system. (See CX-6; CX-10).

Based on the foregoing, I find that Roberts engaged in protected activity under 49 U.S.C. § 31105(a)(1)(B)(i) of the STAA, of which Respondent through Jamison had knowledge, by refusing to drive Truck No. 1 because of the inaccurate and improper post-trip inspection report on September 17, 2001, which failed to conform to and thus violated a DOT regulation or standard, specifically FMCSRs §§ 396.11 and 396.13.

However, I do not find or conclude that Complainant established a reasonable apprehension of serious injury to himself or the public because of the unsafe condition of Truck No. 1. Roberts sought correction of the air leak and defective brakes from Respondent to which Jamison responded. The air leak was repaired and the truck was subsequently driven by another driver. Therefore, I find Complainant has not met the elements of protected activity for refusing to drive Truck No. 1 under 49 U.S.C. § 31105(a)(1)(B)(ii) because he failed to qualify for protection since he sought, and obtained, correction of the unsafe condition.

Complainant's assignment to Truck No. 2 presented similar problems. Initially, he was unable to find the previous driver's post-trip inspection report. With assistance from Ms. Jeffcoat, two inspection reports were discovered. The latest report reflected a 9-mile discrepancy with the odometer reading. Roberts reported the inaccurate post-trip inspection report to Jamison. In response, Jamison prepared and/or signed another post-trip inspection report correcting the 9-mile discrepancy, but without physically inspecting or certifying the equipment and items to be inspected.

I was not impressed with Jamison's testimony regarding the "corrected" post-trip inspection report. Jamison admitted during examination by the undersigned that this report was invalid. He could not explain why he signed the report or what his intent was in doing so. He did not conduct a physical inspection of Truck No. 2, nor drive the truck a short distance and perform a pre-trip inspection. He stated Respondent did not use the report for "anything" and he did not know it even existed. I conclude that Respondent, through Jamison's actions, falsified the inspection report to satisfy Complainant's second complaint that morning of mileage discrepancies in post-trip inspection reports. In doing so, Jamison exhibited a complete disregard for the FMCSRs and the safety purpose of mandating post-trip inspection reports. He then directed Roberts to "go finish the pre-trip" inspection.

During the pre-trip inspection, Complainant discovered defective windshield wipers with the rubber coming off and the metal rubbing the windshield. Roberts informed Jamison that, not only had he "falsified" the post-trip inspection report, but Truck No. 2 needed repairs before its operation and he wanted the windshield wipers repaired. I credit Roberts's testimony, over Jamison's general denial, that Jamison "got real aggressive" and stated that "undoubtedly you just don't want to be here . . . just drive the damn vehicle or go the hell home."

Roberts requested that Jamison call Penske to come out and repair the wipers, but he refused to call Penske. Roberts then put Truck No. 2 "out-of-service" because of the improper post-trip inspection report and defective windshield wipers. Jamison denied telling Roberts to go the hell home, but acknowledged directing Roberts to drive Truck No. 2 to Penske and have the wipers replaced. Again, Jamison flagrantly disregarded the FMCSRs by directing Roberts to drive Truck No. 2 with defective windshield wipers contrary to the literal requirements of Section 392.7 and in violation thereof.

The regulations do not prescribe under what road or weather conditions it is permissible to drive a vehicle with defective windshield wipers. Section 392.7 prescribes that a vehicle **shall not be driven unless the driver is satisfied** that the affected parts **are in good working order.** No DOT Interpretation was proffered as guidance in applying the literal wording of the regulation. Ms. Jeffcoat disagreed with Roberts's conclusion that Truck No. 2 should be put "out-of-service" or was unsafe to drive because of defective wipers, since it was not raining and there was not a cloud in the sky. The opinion of Jamison, a non-driver, has no probative value. Neither Jamison nor Jeffcoat were assigned to drive Truck No. 2, and, therefore, I find neither was in a better

position to determine whether Truck No. 2 should have been driven to Penske for windshield wiper repairs. Under the circumstances presented by the events of the morning of September 17, 2001, I do not regard Jamison or Jeffcoat as "reasonable individuals" whose judgment should be substituted for Complainant's.

Respondent's argument that since the last driver certified the truck to be in good working order, "the wiper blades must not have been in too bad of shape," is specious. It is as persuasive as the driver of Truck No. 1 also certifying that it was in good working order, but an air leak and defective brakes were detected on pre-trip inspection.[5] Contrary to Respondent's argument in brief that Roberts was "not required to operate the truck or threatened in any way," I find Respondent sent Roberts home when he refused to drive Truck No. 2 to Penske, thus affecting his terms and conditions of employment for that work day.

Based on the above, I also find that Roberts engaged in protected activity under 49 U.S.C. § 31105(a)(1)(B)(i) of the STAA, of which Respondent through Jamison had knowledge, by refusing to drive Truck No. 2 because of (1) an inaccurate and "falsified" post-trip inspection report on September 17, 2001, which failed to conform and thus violated a DOT regulation or standard, specifically FMCSRs §§ 396.11 and 396.13; and (2) because of defective windshield wipers which he, as the assigned driver of the vehicle, determined was not in good working order and constituted an unsafe condition.

Moreover, I find and conclude that Complainant established a reasonable apprehension of serious injury to himself or the public because of the unsafe condition of Truck No. 2. Unlike Truck No. 1, Roberts requested that Penske be summoned to correct the defective windshield wipers, but Jamison refused the request. Instead, Jamison directed Roberts to drive the unsafe vehicle to Penske for repairs, in contravention of Section 392.7 of the FMCSRs. Roberts was unable to obtain correction of the safety condition and was sent home. Accordingly, I find that Complainant engaged in protected activity by fulfilling the requirements of 49 U.S.C. § 31105(a)(1)(B)(ii) of refusing to drive Truck No. 2 under the extant circumstances.

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[5] Respondent's argument is further weakened by the subsequent repairs made on Truck No. 2 which included, in addition to the replaced wipers, greasing the fifth wheel and repairs to defective and inoperable tail and brake lights.

2. The External Complaints

Complainant credibly testified that on September 17, 2001, he contacted State and Federal agencies about Respondent's actions and his safety concerns and issues and asked to file a complaint. On September 18, 2001, he again contacted the Federal Motor Carrier Safety Administration and requested an official investigation be commenced against Respondent. I find these contacts and complaints about Respondent's actions and concerns/issues of safety related to Respondent's trucks to be protected activity.

Roberts also credibly testified that at about 1:00 p.m. on September 18, 2001, he informed Ramia that he had contacted the Federal Motor Carrier Safety Administration and started a complaint process regarding safety violations of September 17, 2001. Ramia was aware of the preceding day's events through Jamison. Ramia observed that such events had upset Jamison. Ramia did not deny that he had such a conversation with Roberts. He testified he could not recall Roberts informing him that he had filed outside complaints. Ramia confirmed that if Complainant informed him of his complaint filing, he would have told his "boss."

I find it more than a coincidence that one hour later Jamison telephoned Roberts at home, which he had never done before, and requested his presence at a meeting to discuss the preceding day's events. I further find that in view of the temporal relationship between Roberts's contact with Ramia and Jamison summoning him for a meeting, the meeting was motivated by Complainant's telephone contact with Ramia and his outside filings of safety complaints.

3. Respondent's Adverse Action

It is undisputed that on September 17, 2001, Roberts was sent home after he refused to drive Truck No. 2. The following day, Roberts was terminated from his employment with Respondent. Jamison's ire about Roberts's complaints is demonstrated by his reference to the FMCSRs as "bullshit," and directing Roberts to "drive . . . or go the hell home," which patently establishes Respondent's animus towards Roberts's protected activity. The pivotal issue is whether Respondent's actions in sending Roberts home and thereafter terminating him was motivated, even in part, by his protected activity. I find that Respondent's actions were so motivated for the reasons discussed below.

E. The Alleged Legitimate, Nondiscriminatory Reason for Termination

Respondent contends that Complainant was terminated for repeated refusals during the September 18, 2001 meeting to follow its policy concerning the inspection of trucks which had either incomplete or missing post-trip inspection reports.
A preliminary discussion of the policy before September 18, 2001, is warranted.

1. The Pre-September 18, 2001 Policy

The record in this matter establishes that confusion existed as to the applicable company policy regarding the inspection of trucks with inadequate or missing post-trip inspection reports.

Complainant was of the opinion that a post-trip inspection report was required pursuant to the FMCSR § 396.11, except in **unusual circumstances**, and, when a report was inadequate or missing, Respondent's policy was to call the driver who failed to properly complete the report to "come in" and correct the report. To his knowledge, the foregoing was the policy under Mr. Stone and there was no change after Jamison became his supervisor.

Complainant testified that if the trucks to which he was assigned did not require repairs, he would have performed short driving trips and prepared a pre-trip inspection report. He had done so at the request of Jamison on one occasion before September 17, 2001, but disputed that, based on this one incident, Respondent's policy had changed. No written policy was ever published or distributed before September 19, 2001 concerning the procedure made the subject of the latter memorandum.

On the other hand, Ms. Jeffcoat had performed "in house" inspections for two years before September 17, 2001. The record reveals that the "in house" inspection apparently involved only a post-trip inspection and no short driving trip since Ms. Jeffcoat did not perform a short trip on September 17, 2001. The driver then performed a pre-trip inspection. It is unclear from Ms. Jeffcoat's testimony whether a short driving trip was involved in an "in house" inspection procedure. However, she confirmed the "in house" inspection was the same procedure as described in Respondent's September 19, 2001 memorandum. An inadequate or missing post-trip inspection report occurred once a week out of 15 trucks according to Ms. Jeffcoat.

In the absence of a post-trip inspection report, Jamison's position was that a "short trip" followed by a pre-trip inspection report would suffice for a post-trip inspection report. He claimed

it was the same procedure used by Mr. Stone and was approved by Respondent's Safety Representative, Mr. Potter. Miller Carrier Consultants, Inc. also suggested the same procedure. Although Jamison stated the process was commonly used in the past, he consulted Miller because of a similar situation which occurred with Complainant, because Jamison had **never encountered the specific situation** and was **not sure what "we should do."** Jamison disputed that missing or inadequate post-trip inspection reports occur once a week. He claimed it was only a coincidence that both trucks assigned to Roberts on September 17, 2001, had inadequate post-trip inspection reports.

At some point, Mr. Potter urged Jamison to publish guidelines "concerning the identical situation as embodied" in the DOT Interpretations of FMCSR § 396.11, Question 14. No publication was announced regarding Respondent's policy until after Roberts was terminated. I find Jamison's testimony incredulous that the reason the memorandum was not distributed before September 19, 2001, was "everyone knew what to do" and the procedure was "widely understood." Although the procedure was to be used "in the **rare** circumstance" where a post-trip inspection report was not totally completed or 100% correct, Jamison did not promulgate the policy earlier because he did not want to validate "or have anybody think that I was validating not doing" the post-trip inspection report. Yet, the memorandum does not conform to Jamison's intent.

2. The September 18, 2001 Meeting

Jamison voiced his position as set forth above at the September 18, 2001 meeting to which Roberts disagreed. Contrary to Respondent's contention that its decision maker, Mr. Hildegardner, had no knowledge of Roberts's protected activity, Complainant announced at the commencement of the meeting that he "had already contacted the Department of Transportation."

Even before the intended purpose of the meeting arose, Mr. Hildegardner remarked, as a precursor to the conclusion of the meeting, that if Roberts would not turn his tape recorder off "I don't see how this employee/employer relationship can continue."

Roberts informed the attendees that unavailable post-trip inspection reports "happen every day," not once a month or every two months. When Roberts indicated he would wait for a post-trip inspection report to be filled out by the previous driver, in the absence of a post-trip report, Mr. Hildegardner again remarked "sounds like this gentleman's not happy working with this company . . . I don't know if ya'll can continue that relationship or not." Jamison described Roberts's suggestion as "asinine." However, Mr.

Montgomery acknowledged that Respondent should be dealing with drivers who are not doing post-trip inspection reports, to which Roberts commented "why haven't we?"

Although Jamison mentioned "Motor Carrier's" opinion that a pre-trip overrides the previous day's post-trip inspection report, the DOT Interpretations, upon which Respondent relies to justify its adverse action, was never mentioned during the meeting.

In response to Roberts's statement that he had "no problem working with management, Mr. Hildegardner, for unknown reasons, raised Roberts's "attitude," and stated he did not know why Roberts wanted to work for Respondent. Mr. Montgomery stated Roberts did not have to work for Respondent. Mr. Hildegardner informed Complainant if he could not abide by Respondent's position he needed to seek other employment. Roberts responded he would continue to do DOT inspections as DOT regulations mandate. Roberts then clearly posited that he would not go out [drive] without a correct post-trip inspection report and without reviewing it to determine if there were any defects on it.

At the meeting, Respondent never explained that its position was to be used only in "unusual circumstances." When Roberts informed the attendees he would not take civil liability for Respondent, Mr. Hildegardner terminated Complainant.

I find the meeting of September 18, 2001, was merely a formality and a means used by Respondent to justify its termination of Complainant. On six different occasions during the meeting, Mr. Hildegardner observed that termination was the likely result of the meeting. Despite Roberts confirming he would follow DOT regulations, Respondent terminated him for failing to agree to follow its policy. Respondent never informed Roberts that its policy was in conformity with DOT Interpretations and never limited its usage to "unusual circumstances." Roberts had previously conceded to the "in house" inspection procedure used by Ms. Jeffcoat and followed Jamison's procedure the day before, yet Respondent terminated him. I find Respondent's purported reason for discharging Roberts was neither legitimate nor nondiscriminatory. Since Respondent's reason does not have credence nor conform to permissible interpretative guidance, I find Complainant carried his ultimate burden of substantiating he was retaliated against by Respondent because of his protected activities.

3. The September 19, 2001 Memorandum

The September 19, 2001 memorandum provides:

> In instances where the DVIR (post-trip) has not been prepared or cannot be located it is permissible under 396.11 of the FMCSR for a driver to prepare a DVIR based on a pre-trip inspection and a short drive of a motor vehicle.

(CX-14; RX-2, p. 2).

Respondent's memorandum does not conform to the DOT Interpretation of FMCSR § 396.11. The Interpretation is considered an alternative to the requirements of the FMCSR § 396.11, to be used in "unusual circumstances," however Respondent used the alternative in every record instance where an inadequate or missing post-trip inspection report existed. Thus, Respondent always substituted the Interpretation for the regulatory requirements.

Moreover, in announcing its written policy to all drivers, Respondent did not restrict the alternative procedure to "unusual circumstances" as set forth in the Interpretation. Respondent's inadequate or missing post-trip inspection reports occurred too frequently to be considered an "unusual" event. Respondent applied a hybrid of the alternative rather than the regulation which had no limitations as to usage. I find Respondent's promulgated policy was non-conforming and exceeded even the DOT's Interpretative guidance. The lack of written guidance or for that matter any uniform guidance at the time of Complainant's termination, and the subsequent non-conforming procedure, buttresses my conclusion that Respondent's reasons for terminating Roberts were a mere pretext and therefore unlawful.

I further find Respondent has failed to establish that it had a legitimate, nondiscriminatory business reason for its actions. A policy which permits a company to take adverse action against an employee for obeying the law, e.g., adhering to DOT Regulations, is not "legitimate." See Ciotti v. Sysco Foods of Philadelphia, supra @ 7.

F. CONCLUSION

I find and conclude Roberts's operation of Truck Nos. 1 and 2, in the circumstances presented, would have resulted in the violation of DOT regulations. Such regulations require that the previous driver prepare and sign a post-trip inspection report at

the completion of his/her trip and that the motor carrier repair any defects or deficiencies listed. 49 U.S.C. § 396.11. The next driver then must "be satisfied that the motor vehicle is in safe operating condition . . . ." 49 U.S.C. § 396.13. To do so, the next driver must "review the last vehicle inspection [post-trip] report" and must sign the report to certify that required repairs have been performed." Thus, Roberts, in the circumstances of this case, would have operated the vehicles in violation of FMCSR §§ 396.11 and 396.13 had he driven either Truck Nos. 1 or 2 on September 17, 2001, since both vehicles were the subject of incomplete or inadequate post-trip inspection reports.

I further find and conclude that the preponderance of the record evidence establishes that Complainant's safety complaints, related to inadequate post-trip inspection reports and defective windshield wipers, motivated, in part, Respondent's decision to terminate Roberts. Temporal proximity between Roberts's protected activity and his termination by Respondent is also persuasive in establishing a causal connection for Respondent's adverse actions and justifying an inference of retaliatory motive. See Skinner v. Yellow Freight System, Inc., Case No. 90-STA-17 @ 7 (Sec'y May 6, 1992).

G. Relief

A successful complainant under the STAA is entitled to affirmative action to abate the violation, reinstatement to his former position with the same pay, terms and privileges of employment, attorney fees and costs reasonably incurred, and may also be awarded compensatory damages.

Specifically, the STAA provides that:

> If the Secretary decides, on the basis of a complaint, a person violated subsection (a) of this section, the Secretary shall order the person to
>
> (i) take affirmative action to abate the violation;
>
> (ii) reinstate the complainant to the former position with the same pay and terms and privileges of employment; and
>
> (iii) pay compensatory damages, including back pay.

49 U.S.C. § 31105(b)(3)(A). Considering the foregoing findings and conclusions, reinstatement, back pay, restoration of benefits

including vacation pay, interest and attorney fees and costs are hereby ordered.

1. Reinstatement

Reinstatement provides an important protection for employees who report safety violations. "[T]he employee's protection against having to choose between operating an unsafe vehicle and losing his job would lack practical effectiveness if the employee could not be reinstated pending complete review." Brock v. Roadway Express, Inc., 481 U.S. 252, 258-259 (1987). These protections also extend to employees who refuse to drive vehicles because of safety concerns. 49 C.F.R. § 392.7. Reinstatement is an appropriate, statutory remedy under the circumstances of this case. See Clifton v. United Parcel Service, Case No. 94-STA-16 @ 1-2 (ARB May 14, 1997)(no front pay where reinstatement is an appropriate remedy).

In the absence of a valid reason for not returning to his former position, immediate reinstatement should be ordered. Dutile v. Tighe Trucking, Inc., Case No. 93-STA-31 (Sec'y Oct. 31, 1994). Accordingly, David O. Roberts is entitled to immediate reinstatement to his former position with the same pay and terms and privileges of employment, or if his former job no longer exists, Respondent shall unconditionally offer him reinstatement to a substantially equivalent position in terms of duties, functions, responsibilities, working conditions and benefits. Respondent's back pay liability terminates upon the tendering of a **bona fide** offer of reinstatement even if Complainant rejects it. Id.

2. Back Pay

The purpose of a back pay award is to make the employee whole, that is, to restore the employee to the same position he would have been in if not discriminated against. Dutkiewicz v. Clean Harbors Environmental Services, Inc., Case No. 95-STA-34 (ARB Aug. 8, 1997). Back pay calculations must be reasonable and supported by evidence; they need not be rendered with "unrealistic exactitude." Cook v. Guardian Lubricants, Inc., Case No. 95-STA-43 @ 11 (ARB May 30, 1997). Back pay is typically awarded from the date of a complainant's termination until reinstated to his former employment. Any uncertainties in calculating back pay are resolved against the discriminating party. Kovas v. Morin Transport, Inc., Case No. 92-STA-41 (Sec'y Oct. 1, 1993).

Once a complainant establishes that he or she was terminated as a result of unlawful discrimination on the part of the employer, the allocation of the burden of proof is reversed, i.e., it is the employer's burden to prove by a preponderance of the evidence that

the back pay award should be reduced because the employee did not exercise reasonable diligence in finding other suitable employment. Polwesky v. B & L Lines, Inc., Case No. 90-STA-21 (Sec'y May 29, 1991); See also Johnson v. Roadway Express, Inc., Case No. 99-STA-5 @ 16 (ARB Mar. 29, 2000)(it is employer's burden to prove, as an affirmative defense, that the employee failed to mitigate damages).

The employer may prove that the complainant did not mitigate damages by establishing that comparable jobs were available, and that the complainant failed to make reasonable efforts to find substantially equivalent and otherwise suitable employment. Johnson v. Roadway Express, Inc., Case No. 99-STA-5 @ 4 (ARB Dec. 30, 2002); See also Weaver v. Casa Gallardo, Inc., 922 F. 2d 1515, 1527 (11th Cir. 1991). Unlike Johnson, I find that Roberts did not make any effort or seek to secure suitable equivalent employment from the date of his termination on September 18, 2001 until June 3, 2002. Although he performed contractual work from late October 2001 through late May 2002 earning $1,175.00 instead of working full-time, he chose to make himself available to the OSHA investigator and work on and research his complaint. (CX-16). Therefore, I find Respondent was relieved of its burden of providing availability of substantially equivalent jobs as required by the mitigation of damages doctrine during the period from September 19, 2001 to June 3, 2002. As a consequence of his failure to mitigate his damages during that period, I further find and conclude Complainant is not entitled to any back pay from September 19, 2001 to June 3, 2002.

However, I find that commencing on June 3, 2002, Roberts began exercising reasonable diligence in mitigating his damages by seeking suitable equivalent employment. He applied at four trucking companies, but succeeded only in obtaining a part-time, on-call position with Phoenix Metals Support Dedicated Services earning $12.50 per hour for a total of $704.15 for five days work in June and July 2002. (Tr. 93; CX-16). I find this employment is not comparable to his former employment with Respondent because of its reduced terms and conditions of employment.

I find that on June 3, 2002, the burden shifted to Respondent to prove Complainant did not thereafter mitigate his damages by establishing that comparable jobs were available in the job market and that Complainant failed to make reasonable efforts to find substantially equivalent employment. Respondent has not shown any substantially equivalent positions were available for Complainant after June 3, 2002. Thus, Complainant is entitled to back pay from June 3, 2002 to present (40 weeks) and continuing until offered reinstatement by Respondent.

Complainant earned $11.00 per hour at 40 hours per week straight time (40 hours x $11.00 = $440.00 per week) plus 12.5 additional hours per week as overtime computed at time and one-half or $16.50 per hour (12.5 hours x $16.50 = $206.25) for a total weekly wage of $646.25. Complainant's back pay entitlement is $25,850.00 (40 weeks x $646.25 per week) commencing on June 3, 2002 through the date of this Recommended Decision and Order, offset by his interim earnings of $2,560.15 or a revised total of $23,289.85. His entitlement continues hereafter at $646.25 per week until he receives an offer of reinstatement.

3. Restoration of Other Benefits

Because I find Respondent violated the STAA when it discharged Roberts, he "is entitled to any damages that flow from the unlawful discharge." Hufstetler v. Roadway Express, Inc., Case No. 85-STA-8 @ 52 (Sec'y Final Dec. and Ord., Aug 21, 1986), aff'd on other grounds sub nom., Roadway Express, Inc. v. Brock, 830 F.2d 179 (11th Cir. 1997). Once a complainant establishes that he or she was terminated as a result of unlawful discrimination on the part of the employer, a presumption in favor of full relief arises. Gabby v. Abex Corp., 884 F.2d 312, 318 (7th Cir. 1989).

Complainant seeks and is entitled to two weeks of accrued vacation pay at $440.00 per week or $880.00. Moyer v. Yellow Freight System, Inc., [Moyer II], Case No. 89-STA-7 @ 36 (Sec'y Aug. 21, 1995), rev'd on other grounds sub nom. Yellow Freight System, Inc. v. Reich, 103 F.3d 132 (6th Cir. 1996). His uncontradicted testimony establishes he is also entitled to a safety bonus in the amount $1,200.00.

Complainant is entitled to expungement from his employment records of any adverse or derogatory reference to his protected activities of September 17 and 18, 2001, and his discriminatory termination on September 18, 2001. See Michaud v. BSP Transport, Inc., Case No. 95-STA-29 (ARB Oct. 9, 1997).

A notice to all employees should be posted by Respondent in places where employee notices are customarily posted to advise of the findings in this matter as an abatement of the violations. Scott v. Roadway Express, Inc., Case No. 98-STA-8 (ARB July 28, 1999).

4. Compensatory Damages

Complainant may be entitled to compensatory damages under the STAA. To recover compensatory damages, Complainant must show that he experienced mental and emotional distress caused by Respondent's

adverse employment action. See Dutkiewicz v. Clean Harbors Environmental Services, Inc., supra. An award may be supported by the circumstances of the case and testimony about physical or mental consequences of the retaliatory action and include emotional pain and suffering and humiliation. Id. @ 9.

Complainant testified that he was embarrassed and humiliated by his termination by Respondent for raising safety issues and concerns. He had never been terminated from employment before this action. He further testified that his termination caused a strain on his marriage and affected his financial capability to provide for his wife in the manner he had customarily done before his termination. The foregoing evidence is unrefuted, credible and persuasively supports the award of compensatory damages.

However, considering the entire record and Complainant's failure to seek equivalent alternative employment from September 19, 2001 to June 3, 2002, I do not find such emotional distress to be "severe" as urged by Complainant. In light of the emotional embarrassment and humiliation to which Complainant testified, I find and conclude that he is not entitled to an award of "double damages," but to $10,000.00 as compensatory damages.

H. Interest

Interest is due on back pay awards from the date of termination to the date of reinstatement. Prejudgment interest is to be paid for the period following Robert's termination on September 18, 2001, until the instant order of reinstatement. Post-judgment interest is to be paid thereafter, until the date of payment of back pay is made. Moyer v. Yellow Freight System, Inc., [Moyer I], Case No. 89-STA-7 @ 9-10 (Sec'y Sept. 27, 1990), rev'd on other grounds sub nom. Yellow Freight System, Inc. v. Martin, 954 F.2d 353 (6th Cir. 1992). The rate of interest to be applied is that required by 29 C.F.R. § 20.58(a)(1999) which is the IRS rate for the underpayment of taxes set out in 26 U.S.C. § 6621 (1999). Moyer II, @ 40. The interest is to be compounded quarterly. Ass't Sec'y of Labor for Occupational Safety and Health and Harry D. Cote v. Double R Trucking, Inc., Case No. 98-STA-34 @ 3 (ARB Jan. 12, 2000).

I. Attorney's Fees and Costs

Lastly, Complainant is entitled to reasonable costs, expenses and attorney fees incurred in connection with the prosecution of his complaint. 49 U.S.C. § 31105(b)(3)(B); Murray v. Air Ride, Inc., Case No. 99-STA-34 (ARB Dec. 29, 2000). Counsel for Complainant has not submitted a fee petition detailing the work

performed, the time spent on such work or his hourly rate for performing such work. Therefore, Counsel for Complainant is granted thirty (30) days from the date of this Recommended Decision and Order within which to file and serve a fully supported application for fees, costs and expenses. Thereafter, Respondent shall have twenty (20) days from receipt of the application within which to file any opposition thereto.

V. RECOMMENDED ORDER

IT IS HEREBY ORDERED that:

(1) Respondent offer Complainant, David O. Roberts, reinstatement to his former position with the same pay, terms and privileges of employment that he would have received had he continued working from September 18, 2001 through the date of the offer of reinstatement;

(2) Respondent pay Complainant, David O. Roberts, back pay at the weekly wage of $646.25 for the period from June 3, 2002 through the present or $23,289.85 and continuing thereafter until unconditional reinstatement is offered, less authorized payroll deductions, with interest thereon calculated pursuant to 26 U.S.C. § 6621;

(3) Respondent pay Complainant, David O. Roberts, accrued vacation pay in the amount of $880.00 and accrued safety bonuses amounting to $1,200.00, with interest thereon calculated pursuant to 26 U.S.C. § 6621;

(4) Respondent pay Complainant. David O. Roberts, compensatory damages in the amount of $10,000.00;

(5) Respondent shall expunge from the employment records of Complainant, David O. Roberts, any adverse or derogatory reference to his protected activities of September 17 and 18, 2001 and his discriminatory termination on September 18, 2001;

(6) Respondent shall post copies of the Notice of Findings (Appendix A), attached to this Recommended Decision and Order, for 60 consecutive days in conspicuous places where employee notices are customarily posted in and about its Tarrant Distribution, Birmingham, Alabama facility, assuring that it is not altered, defaced or covered by other material; and

(7) Counsel for Complainant shall have thirty (30) days from the date of this Recommended Decision and Order within which to

file a fully supported application for fees, costs and expenses. Thereafter, Respondent shall have twenty (20) days from receipt of the fee application within which to file any opposition thereto.

ORDERED this 6th day of March, 2003, at Metairie, Louisiana.

A

LEE J. ROMERO, JR.
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N. W., Washington, D. C. 20210. See 29 C.F.R. § 1978.109(a); 61 Fed. Reg. 19978 (1996).

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
Administrative Review Board,
U.S. DEPARTMENT OF LABOR

In the Matter of

David O. Roberts

Complainant

v.

Marshall Durbin Company

Respondent

OALJ CASE NO. 2002-STA-35

Notice of Findings regarding Termination of
David O. Roberts's Employment on September 18, 2001

After a formal hearing in which all participants had the opportunity to present evidence, the Administrative Review Board, U.S. Department of Labor, has found that Marshall Durbin Company (Respondent) violated the law, and has ordered the posting of this Notice.

The Surface Transportation Assistance Act ("STAA"), 49 U.S.C. § 31105(a)(1), provides that a person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because

> (A) the employee . . . has filed a complaint or begun a proceeding related to a violation of a commercial motor carrier vehicle safety regulation, standard, or order . . ., or

> (B) the employee refuses to operate a vehicle because
>
> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
>
> (ii) the employee has a reasonable apprehension of serious injury to [himself] or the public because of the vehicle's unsafe condition. [To qualify for protection under this provision a complainant must also have sought from the employer, and been unable to obtain, correction of the unsafe condition.]

The Federal Motor Carrier Safety Regulations ("FMCSRs") found at 49 C.F.R. § 392.7 contains the following proviso:

> No commercial motor vehicle shall be driven unless the driver is satisfied that [certain listed parts and accessories] are in good working order . . .

The FMCSRs found at 49 C.F.R. Part 396 contain the following requirements:

> (1) every driver of a commercial motor vehicle must prepare a written report (the Driver's Vehicle Inspection Report or DVIR) at the completion of each day's work on each vehicle operated. The DVIR must identify the vehicle and list any defect or deficiency discovered by or reported to the driver which would affect the safety of operation of the vehicle or result in its mechanical breakdown. If no defect or deficiency is discovered by or reported to the driver, the DVIR shall so indicate. In all instances, the driver must sign the DVIR. 49 C.F.R. § 396.11(a)-(b).
>
> (2) Prior to requiring or permitting a driver to operate a vehicle, every motor carrier or its agent shall repair any defect or deficiency listed on the DVIR which would be likely to affect the safety of operation of the vehicle. Every motor carrier or its agent must certify on the original DVIR which lists any defect or deficiency that the defect or deficiency has been repaired or that repair is

unnecessary before the vehicle is operated again. 49 C.F.R. § 396.11(c).

Marshall Durbin Company **WILL NOT** discharge or otherwise discriminate against employees because they engage in protected activities.

Marshall Durbin Company **WILL** unconditionally offer David O. Roberts immediate and full reinstatement to his former job, or if the position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

Marshall Durbin Company **WILL** make David O. Roberts whole for any loss of earnings, benefits and other forms of compensation he may have lost, plus interest thereon, because Marshall Durbin Company discriminated against him.

Marshall Durbin Company **WILL** pay David O. Roberts $10,000.00 in compensatory damages because of embarrassment and humiliation imposed upon him as a result of Marshall Durbin Company's discriminatory, adverse employment action.

Marshall Durbin Company **WILL** expunge from the employment records of David O. Roberts all adverse or derogatory references to his protected activities and his discriminatory termination on September 18, 2001.

Marshall Durbin Company **WILL** reimburse David O. Roberts for costs and expenses, including attorney's fees, incurred in the prosecution of his complaint against Marshall Durbin Company.

MARSHALL DURBIN COMPANY
(Respondent)

Dated:_____ By:_____
(Representative) (Title)

THIS NOTICE IS POSTED BY ORDER OF THE ADMINISTRATIVE REVIEW BOARD, U.S. DEPARTMENT OF LABOR. IT SHALL BE POSTED FOR A PERIOD OF NOT LESS THAN 60 CONSECUTIVE DAYS IN CONSPICUOUS PLACES AT THE MARSHALL DURBIN COMPANY, TARRANT DISTRIBUTION FACILITY, INCLUDING ALL PLACES WHERE EMPLOYEE NOTICES ARE CUSTOMARILY POSTED.